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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOE M. MOORE, Defendant and Appellant.	A120287 (Alameda County Super. Ct. No. CH40604)

I. INTRODUCTION

A jury found Joe Moore guilty of the first degree murder of Jeff Arroyo (Pen. Code, § 187, subd. (a).)[1] The jury also found true a special circumstance allegation that the murder was committed during the course of a robbery or attempted robbery (§ 190.2, subd. (a)(17)(A)), and allegations that Moore personally used a firearm, personally and intentionally discharged a firearm, and personally and intentionally discharged a firearm causing great bodily injury (§§ 12022.5, subd. (a)(1), 12022.7, subd. (a), 12022.53, subd. (d)). Moore was sentenced to life in prison without the possibility of parole for the murder, and a consecutive term of 25 years to life for the section 12022.53 firearm enhancement. The court stayed sentences on the remaining enhancements.

On appeal, Moore contends that numerous trial errors require reversal of the judgment against him. Although we reject most of Moore's claims of error, we do find that Moore invoked his constitutional right to silence during one of several interrogations

[1] Undesignated statutory references are to the Penal Code.

by investigators in this case, and that statements Moore made after he invoked that important right should not have been admitted into evidence at trial. However, for reasons that we will explain, the erroneous admission of this evidence was not prejudicial. We also find there was an error in one of the jury instructions that was used in this case. Again, though, the error was not prejudicial. Therefore, we will affirm the judgment.

II. STATEMENT OF FACTS

A. *The Murder of Jeff Arroyo*

On September 11, 2004,[2] at 12:18 p.m., Jeff Arroyo called his friend Michael Breen and asked for some marijuana. Breen met Arroyo on the corner of 163rd Avenue and Helo Drive in San Leandro and gave him enough marijuana to roll a joint. When Breen left, Arroyo was sitting in the driver's seat of his brown Chevrolet Caprice. A short time later, just after 12:30 p.m., Arroyo was found dead in his car from a gun shot to the head. Three witnesses testified about what they saw.

Edwin Hernandez testified that, on the date in question, he looked out the window of his apartment on the corner of 163rd Avenue and Helo at around 12:30 p.m., and saw two cars parked on 163rd Avenue, one of which was green. The green car was parked on his side of the street, just outside his window. The other car was parked on the corner across the street. There was one person in the driver's seat of each car. A third person stood outside the passenger door of the car that was parked on the corner across the street from the green car. The man talked to the driver and then got into the car. That car started to move, Hernandez heard a gun shot, and then the car came to a stop on the lawn of a home on Helo Drive. A person exited the passenger side of the car, went around and opened the driver's door and then went and got in the green car, which drove away.

At the time of trial, Hernandez testified that he could not remember many details about the incident. Evidence was presented that, on the day Arroyo was shot, Hernandez gave a statement to investigators in which he said he saw an African-American man in

[2] Unless otherwise indicated, all date references are to the 2004 calendar year.

his mid-twenties get out of the green car and get into the passenger side of the other car, which was brown. Hernandez also reported that, as the brown car slowly rolled down Helo drive, the two men inside it were fighting.

Yvonne Amesse testified that, on September 11, she and other family members went to visit her uncle who lived in San Leandro, although Amesse could not recall the address. At around 12:30 p.m., Amesse had just put her bags down in the living room when she heard yelling and arguing outside. From the living room window, she saw a brown sedan parked on the corner. An African-American man with a short hairstyle and a medium-to-dark complexion, was standing at the opened passenger door of the brown sedan. He was leaning into it, pointing a gun and arguing with the driver. As Amesse ran to the back of the house, she heard tires squeal and a gunshot.

Thomas Maldonado testified that he was at his home on Helo Drive on September 11, when, at some time between 12:00 and 12:30 p.m., he heard a gunshot and tires squealing. From his front door, he saw a brown car weave down the street and come to a stop in the yard across the street. Maldonado stepped outside and saw a person get out of the passenger side of the car. Maldonado described the person as a Black male in his mid-twenties, between 5'8" and 5'10" inches tall, with a medium build and short hair. Maldonado testified that the man walked to the driver's side of the car and pointed inside. Then he waved to a person who was alone in a light blue compact car, gestured for that car to pull up, and got in the blue car, which drove away.

B. *The Investigation*

1. *Background*

Responding to a 911 report, Alameda County Sheriffs' Officers arrived at the scene just after 12:30 p.m. Arroyo's brown Chevrolet Caprice was stopped on the lawn of the residence at the corner of 163rd Avenue and Helo Drive. Both the driver's side and passenger doors of the car were ajar and its front bumper was resting against the house. Arroyo's body, covered in blood, was slumped against the car door.

Detective Mike Godlewski, the lead investigator from the Sheriffs' office, spoke to members of Arroyo's family who identified Moore and another acquaintance named

Aaron Meyers as potential suspects. Godlewski focused his attention on Moore because he fit witness descriptions of the shooter. Throughout the investigation, Moore was detained at Santa Rita jail on an unrelated matter. Moore was interviewed several times and his telephone calls from jail were monitored. Portions of these interviews and phone calls were shared with the jury.

During his conversations, Moore used nicknames to refer to many individuals. Moore's nickname is Jomo. Aaron Meyers, the other potential suspect identified by Arroyo's family, is known as Tee or T. Aaron Meyers' brother, DeAndre Horton, is called Dre. Martress Rogers, who was also implicated in the shooting, is referred to as Trez. Arroyo's step-son, Roman Delrosario, is sometimes referred to as Rom or Rome. Arroyo's son, David Galiste, goes by DJ.

2. *The October 8 Statement*

On October 8, Godlewski and Detective Peter Norton interviewed Moore at Santa Rita Jail. Moore waived his *Miranda* rights and agreed to talk. (See *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).) Godlewski said he wanted to ask some questions about a person who had been shot. Moore responded that he did not know anything about that. Godlewski said he thought Moore might know the victim, and asked if Moore knew where 163rd and Helo Drive was. Moore said he did, that a guy named T used to live over there with his family. Moore knew T because he had gone to school with T's brother Dre and had been involved in a rap music group with them. Moore denied that he had a problem with T, although he did complain that T owed him money.

The detectives showed Moore a picture of Arroyo. Moore identified him and said he was the father of another friend from school named DJ. Moore said that he had recently seen Arroyo because he wanted to buy a car from him. When Godlewski said that Arroyo had been killed, Moore expressed surprise and denied knowing anything about the shooting. He told the detectives that there had been a serious dispute between Dre and Arroyo's step-son Rome over the sale of a car.

After suggesting that T and Dre were the kind of people that hired others to do their dirty work, Godlewski made the false statement that Moore's fingerprints were

found in Arroyo's car. Moore repeated that he had considered buying the car and said he had touched the door handle. The detectives then said they had witnesses who had identified Moore as having been at the murder scene. Moore continued to deny that he was involved and said he never had a problem with Arroyo. Then Moore asked to talk to a lawyer and the interview was terminated.

3. *The "Little Al" Phone Calls*

On October 9, at around 11:15 a.m., Moore had a telephone conversation with his girlfriend, Lailani. He asked her to contact "Little Al" and to ask him this question: "Do we still got that? You feel me? Ask him, do we still got it? If he got it, tell him, don't give it to Rom, don't give it to T and them." Moore also said: "I need that. I need that right there. I need that. Real talk baby, cause shit 'bout to hit the fan, an' I'm 'bout to really, man."

During a subsequent phone conversation with Lailani on October 10, Moore asked his girlfriend if she had contacted Little Al yet. When she said she had not, but that she would, Moore said: "If you see if he got it though, if he ain't got it, that's good, tell him don't get, man, see if he, see if he got, got rid of, of whatever, man. If he, if he gave it back to T or whatever, make sure you call my, psssh, make sure you can find out, whatever, what, what's goin' on with that. You know what I'm sayin? I need to see what's up with that."

On October 14, just after 1:00 p.m., Moore called Marc Rogers, who is the brother of Martress (Trez) Rogers. Moore asked whether Marc had a number for Little Al. Rogers said no, "he rapid transitin' now." Then Moore asked Marc to do him a favor and asked "You know that what . . ." Marc said yes, and then Moore said "Man, get that man, dispose of that, whatever man." Marc said he would, that he might have to search for it, but that he would take care of the matter.

4. *The October 14 Statement*

On October 12, Moore called Detective Norton and said he wanted to see if the detectives could help him with the unrelated case for which he was being detained. Moore asked that the detectives come to Santa Rita to talk with him face to face. He said

he did not want to talk over the phone and that he had information for them that would make the trip worthwhile.

On October 14, Detectives Godlewski and Norton interviewed Moore again. The lengthy interview was videotaped and introduced into evidence at trial.

During the first part of October 14 interview, Moore expressed concern for his safety because he had heard that T, Dre and another guy named Red had put a hit out on him. The two most likely reasons for the hit, as far as Moore could tell, were that (1) T did not want to pay him money for a .45 caliber gun that Moore had stolen and then sold to T, and (2) Moore overheard T admit that he killed Arroyo during an attempted carjacking. Moore told a confusing and convoluted story about a history of problems that T and Dre had with Arroyo's sons DJ and Rome. Apparently, this dispute was a possible motive for the attempted carjacking. Moore said that he believed T and his friends were now trying to frame him for Arroyo's murder.

While sharing his story and concerns with the detectives, Moore made several incriminating or potentially incriminating statements. He admitted that, a few months before Arroyo was shot, T had paid him to rob Rome with the .45 gun that he had previously sold to T. Moore also told the detectives that T probably used the same .45 to shoot Arroyo. Moore said that T was probably just trying to carjack Arroyo, that he wasn't trying to kill him. But there was a struggle in the car and the gun just went off. Moore also suggested that T and "them" were probably driving a Teal Mustang that belonged to Trez or Trez's girlfriend.

The detectives questioned Moore's story. They told him they had done a thorough investigation and that they knew he was present when Arroyo was shot. Moore's first response was to clarify that the car that was used in the shooting was a green Mustang that belonged to Trez's girlfriend. However, when the officer's pressed Moore to tell the truth and said they believed he was the shooter, Moore asked to be taken back to jail.

The detectives left Moore in the interview room, while they went to do some paperwork. While Moore was alone in the room, he made the following statement: "These niggas got me so fucked up in the game. That bitch-ass nigga T popped him

nigga, that's who shot him. T popped him. He had on that beanie, that mother fuckin' cap, that's why it look like it was me. Dumb-ass niggas. Motherfuckin' T shot that nigga in his head man. T was tryin' to carjack that nigga, take his mother fuckin' money. Take the motherfucker because he knew Jeff had some paper on him. Motherfuckers heard Jeff had ten, was ridin' around with ten racks on him. Man they wanted me to pop Jeff man. Fuckin', I didn't have no problem with that nigga. (Unintelligible) I'm cool. I'm good."

After a break, during which Moore left the room to have a cigarette, he returned with Deputy Mike Carroll, an officer with whom he had some prior interaction at a BART station. Carroll asked why Moore was there and he responded, "Man these niggers want my head and I was there when somethin' happened. . . . The witnesses say they seen me there. But you know, police say that they, they know I was there. They know I know what happened. . . . I mean but I didn't actually see it all transpire. I got out the car. Went to the car, but I didn't . . . tssst. They say they got me there though." Moore complained that the officers were trying to say that he did it. He again acknowledged that he was there, but maintained that the other guys killed Arroyo. Moore said that the witnesses saw and noticed him because he stands out. He said "I was standin' out there that day, when I made that corner. I stand out. My hair is hella nappy, you feel me. . . . They, I was standin' out. I got out the car, I was hell loud and shit. So those people outside that seen me there, they just didn't see who bounced in the car first."

After Carroll had gone and Godlewski and Norton returned to the interrogation room, Moore expressly admitted to them that he had been present when Arroyo was killed. But he continued to maintain that T was the shooter. Moore said that he was not driving the Mustang but that he was in the car, and he admitted that, at some point, he did "bust out the car." The detectives encouraged Moore to get everything "off his chest." Moore responded that he wanted to talk to his girlfriend and mother first. However, after additional significant prodding by the detectives, Moore supplied additional details about Arroyo's shooting.

Moore admitted that he had been with T and Trez when they "bounced" on Arroyo's car. Moore went to the driver's side, which was why his fingerprints were probably on the inside handle of the driver's door. T went to the passenger side, which was why the shot was fired from that side of the car. Moore said that Arroyo pushed him away from the car, and that T and Arroyo struggled while the car went down the street. Trez, who was driving his girlfriend's Mustang, had already picked Moore up when he heard the gunshot. Then they went and picked up T.

In response to further questions, Moore explained that they had seen Arroyo leaving a liquor store and decided to carjack him. Their intention was just to take the car. T went to the passenger side and pulled out the .45 that Moore had previously sold to him. Moore went to the driver's side and yelled at Arroyo to get out of the car. By that point, T was already inside the car. Arroyo pushed Moore away and fought with T. The car went into gear and moved down the street. Moore just stood there until Trez picked him up. Moore said that, after they picked up T from the middle of the street, T admitted that he shot Arroyo during the struggle in the car. However, Moore did not realize that Arroyo had been killed until a few days later when he saw it on the news.

5. *The October 14 Phone Calls*

On the evening of October 14, Moore called his father, told him that he had talked to the detectives and that T was trying to set him up for a murder. He instructed his father to call Trez and deliver the following message: "Tell him T and them was tryin' to have me bang him, too. Feel me, keep it on, tell him, keep it on the under though. He was gonna have me try to bang him, too and, and so I need him to say if these mother fuckin' people fittin' tryin' to come holler at him. Tell 'em nigga, mother fuckin', I was on the passenger, feel me, I was on the driver, tryin' to open the door, and T was on the passenger, feel me, and, and he, when he got T from the middle of the street, and I was already in the car." Moore also told his father to tell Trez that he should disappear and start a new life in another state.

Later that same night, Moore also called his brother J.P., and asked J.P. to call T and to deliver the following message: "tell 'em, my brother said, he goin' be out in 8

months. . . . If, if y'all can vamoose for 8 months and shake, he'll be out, and when he touch down on the street, ya'all want to see him, he said see him. But give him 8 months, if they can bounce for 8 months so he can touch down on the street, it'll be good."

6. ***Moore's Arrest***

On November 17, Moore was arrested for Arroyo's murder. Godlewski testified that, after he served the arrest warrant, he asked Moore if he wanted to talk. Moore said that he did want to talk to the detectives but that he wanted to speak to his mother first. Godlewski offered the use of his cell phone, which Moore accepted. Godlewski dialed the number, handed the phone to Moore and stood "in close proximity" while Moore talked on the phone, and heard Moore's side of the conversation. Moore said: "They charged me with it. They charged me with the murder," and then said "All the evidence and witnesses point to me." Then Moore said "Because I did it." Godlewski testified that he heard a woman scream on the other end of the phone and then Moore said "I'm sorry Momma."

C. ***Other Trial Evidence***

An autopsy established that Arroyo died as result of a gunshot wound to the head. The bullet entered his right check, just below his right eye. Arroyo also had blunt injuries to his body including bruises and scrapes on his head, neck, arms and leg which were consistent with having been in a fight.

The murder weapon was never found. However, investigators did recover an expended .45-caliber automatic pistol cartridge casing from the passenger's side floor board of Arroyo's car. They also found a wallet that did not appear to belong to Arroyo on the passenger seat of car.[3] One of the items inside the wallet, which did not contain identification, was the top of a Newport cigarette box on which someone had written Martress Rogers' (Trez's) telephone number. A fingerprint lifted from the cigarette box top belonged to Moore.

[3] Arroyo's wallet, which contained his identification and cash, was found in the back pocket of his pants.

Investigators took swab samples from the interior and exterior door handles of Arroyo's car for purposes of DNA testing. The sample taken from the interior driver's side door handle contained a mixture of more than one person's DNA. Neither Moore nor Arroyo could be excluded as contributors. Aaron (T) Meyers, along with more than 99.99 percent of the population of Caucasians, African-Americans, and southwest Hispanics, was excluded as a contributor.

Aaron Meyers was not available to testify as a witness at trial. Therefore, the trial court admitted Meyers' preliminary hearing testimony. Meyers testified that he knew Jeff Arroyo, but that he did not kill him and did not even see him the day he was killed. Meyers testified that, at around noon that day, he was driving to Hayward, either from San Jose or Fremont, when he received a phone call from Moore and Trez.[4] Moore, who had "panic" in his voice, wanted to see Meyers and Meyers agreed to meet at the Bayfair Mall. Meyers recalled that, on the way to the mall, he noticed police and an ambulance nearby and, when he met Moore, he made a joke about that, and asked Moore what he had done. Meyers said that Moore responded that he shot Jeff Arroyo. Moore told Meyers that the incident occurred on 163rd Avenue, and that he had intended to rob Arroyo "for some weed and his car, his rims off of his car, or something like that." Meyers testified that, when he met Moore at the mall, Moore was carrying a weapon and told Meyers that he shot Arroyo in the head and that he needed to get out of town.

D. ***Moore's Trial Testimony***

Moore testified that he knew Arroyo and that the two had smoked "weed" together in the past. On the morning of September 11, Moore ran into Arroyo at the Hayward BART station. They sat together in Arroyo's car and smoked marijuana. However, Moore claimed that he did not see Arroyo again that day and that he was not involved in Arroyo's murder. Moore testified that, after he left Arroyo on the morning of September 11, he visited with a friend at the Hayward BART station until around 12:00 noon, and

[4] Investigators were not able to independently corroborate Meyers' statement regarding his whereabouts on the day of the murder.

then went to meet Aaron Meyers at Bayfair Mall. Meyers owed him $480 and gave him "a couple of dollars" of what he owed.

Moore testified that there were bad feelings between Meyers and Arroyo and that the problems between them started with a dispute about the sale of two cars. Moore acknowledged that the dispute was serious but denied that Meyers ever told him that he shot Arroyo. Moore maintained that he did not know anything about Arroyo's shooting and testified that all information about the incident that he gave to the detectives during the October 14 interview were lies. Moore acknowledged that he spoke to his mother on November 17, after he was arrested. But he denied telling her that he shot Arroyo or that there was evidence against him.[5] Moore also denied that the wallet found in Arroyo's car belonged to him.

During cross-examination, Moore admitted that he was convicted of committing a felony armed robbery on September 28. Moore also admitted that, in August 2004, he used a .45 caliber semi-automatic-pistol to rob Roman Delrosario, Jeff Arroyo's step-son. Moore conceded that he had committed more than two robberies but said "that don't make me a killer though."

Moore testified that he first learned that Arroyo was dead two or three days after it happened, when he saw Arroyo's car on television. He stated that, when the detectives interviewed him on October 8, he told them he did not know Arroyo was dead because he did not want to get involved. Moore also claimed that, at the time he gave the October 8 statement, he was on pain medication because he had recently been shot and, therefore, could not remember the events of September 11. Moore could now recall, though, that he saw Arroyo that morning and sat in the passenger side of the car. During cross-examination, Moore testified that he did not sit in the driver's seat of Arroyo's car. However, when the trial court asked Moore some follow-up questions, Moore testified

[5] Moore's mother, Stephanie Moore, testified at trial that Moore never told her that he killed someone. Stephanie Moore recalled that she talked to her son on the phone after he was arrested and he said "Mom, they said I did it," to which she responded "Did what?" And then he said "killed that man."

that he drove the car on the morning of September 11, while Arroyo talked to him about the "incidents" that had occurred between Arroyo's son and T and other people. Moore said that Arroyo "just wanted to talk to me and see if I could squash the problem."

Moore testified that the phone conversations he had with his girlfriend and Marc Rogers were not about something he wanted them to get "rid of," but rather that he was asking them to sell some drugs he owned so that he could get some money. Moore also testified that the wallet found in Arroyo's car did not belong to him and that he had no recollection of the cigarette box top. He suggested that he may have given someone the "bogus" telephone number "because I usually give people bogus numbers when they ask for my hookup."

When asked why he lied during the October 14 interview, Moore explained "I feel like if you lie to me, why can't I lie to you? Don't play me for stupid." Moore repeatedly testified that he just made up a story and that all the information disclosed during his interviews were lies. Moore also testified that the purpose of the message he asked his father to give to Martress Rogers was so that Trez would know his story but, again, he claimed that the story he told the detectives was a complete lie.

III. DISCUSSION

A. *Miranda Issues*

Moore contends the trial court committed reversible error by admitting his October 14 statement into evidence at trial because the detectives who took that statement violated his rights as set forth in *Miranda*, *supra*, 384 U.S. 436.

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda v. Arizona*, *supra*, 384 U.S. 436, the scope of our review is well established. 'We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained.' [Citations.] We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of

Miranda. [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1032-1033 (*Bradford*).)

Moore contends that two distinct *Miranda* rights were violated, his right to an attorney and his right to remain silent. We will address these issues in the chronological order in which they arose.

1. *Right to Counsel*

As reflected in our factual summary above, Moore invoked his right to counsel during the October 8 interview. Moore contends, as he did in the trial court, that he never subsequently waived his right to an attorney and, therefore, the entire October 14 statement was taken in violation of *Miranda* and should have been excluded from evidence at trial.

a. *Background*

On October 8, after Moore expressed his desire to talk with a lawyer, Godlewski and Norton did not ask him any more questions about the Arroyo case.[6] Nevertheless, Moore made additional unsolicited comments about his good relationship with the victim and his desire to give the detectives information about the assailants. Norton told Moore "once you've decided now that you want to talk to an attorney, we can't come back and talk to you." Norton gave Moore his business card in case something came up and said "if you want to, I can't contact you now." Moore said ok, but continued to talk about how he was ready to "roll over on them niggas" and "ready to tell." The detectives reiterated that they could not ask more questions and that they could not come back to talk to Moore unless he contacted them.

On October 12, Moore called Norton and said he had information that he wanted to share. That day, Godlewski and Sergeant Scott Dudek went to Santa Rita jail to talk to Moore. Although evidence of the October 12 interview was not admitted at trial, both Godlewski and Moore testified about that interview at a pretrial hearing.

[6] The transcript of the portion of the October 8 interview that occurred after Moore invoked his right to counsel, though not admitted into evidence at trial, is part of the record on appeal.

Godlewski testified that Dudek accompanied him to Santa Rita that day because Norton was busy. Godlewski did not advise Moore of his *Miranda* rights that day because Moore initiated contact and said he had information. Godlewski was prepared to admonish Moore depending on the nature of the information. Godlewski also testified that he did not attempt to record the conversation because Moore's first statement to them was that somebody had put a hit out on him and Godlewski assumed that Moore would not be comfortable being taped at the jail.

According to Godlewski, on October 12 Moore told them that T and Dre had put a hit out on him because they were trying to blame him for Arroyo's murder. Moore also claimed that he overheard T admit that he killed Arroyo. The detectives said they would look into the matter and asked Moore if he felt safe where he was. Moore asked to be moved to a minimum security facility. The detectives said they could not do that but could arrange for Moore to be put in administrative segregation. Moore declined that offer. Godlewski testified that he asked if they could come and talk to Moore again in the future and that Moore said yes, they could. Godlewski also testified that Moore did not ask for an attorney on October 12.

Moore testified at the pre-trial hearing that he called Detective Norton on October 12 because his cell mate told him that somebody had put a hit on him, but that he did not want to talk about the Arroyo shooting. According to Moore, when Godlewski and Dudek came to talk to him at Santa Rita, he asked for an attorney but the detectives did not bring him a lawyer. Instead, they told him "they'd get back at me and they left because I got into it with the sergeant. I told him basically you got me F'd up, and I want my attorney present." According to Moore, "I asked them basically I said, when Sergeant Dudek came, I said I wanted my attorney present because we got a little aggressive because he said well, I think you did it, and I told him you got me confused. Actually you got me F'd up."

On October 14, Godlewski and Norton went to see Moore at Santa Rita. Godlewski testified at the pre-trial hearing that he told Moore that he would like to speak with him again and asked if Moore would accompany him to a substation where they

could conduct an interview. Moore said that he would. Godlewski also testified that Moore accepted his offer to buy him lunch and that they stopped at "In-and-Out Burger" on the way to the interview. According to Godlewski, there was no discussion about Arroyo's case during the drive, or while Moore ate lunch in the detective's car. Godlewski also testified that Moore did not ask for a lawyer.

At the pre-trial hearing, Moore testified that he did not want to accompany the detectives to the substation on October 14. When asked why he went, Moore testified: "I asked them – I said how you all bringing me out of Santa Rita when I told you I wanted my attorney present. He told me, he said I called him and said they could bring me out of Santa Rita." Moore also claimed that he told the officers "I ain't talking about nothing."

A transcript and videotape of the October 14 interview reflect that the first matter that was discussed was "why we're here." Moore expressly confirmed that, although the October 8 interview ended because he asked to talk to an attorney, he subsequently contacted the detectives on October 12, and told them that he had information to give them. Then, Godlewski said that, before they talked about that information, he wanted to read Moore his rights again. Godlewski advised Moore of his *Miranda* rights including his right to remain silent and to have an attorney present. Moore acknowledged that he understood those rights and stated that he wanted to talk to the detectives.

At the pre-trial hearing, Moore admitted what the videotape and transcript reflect, that he had been advised of his *Miranda* rights, that he said he understood them and that he said he wanted to talk. However, Moore testified that he did not ask for a lawyer when he was given *Miranda* warnings at the beginning of the October 14 interview "[b]ecause they told me at Santa Rita that I called them, said they can bring me up here. They said I had no rights." Moore also claimed that while he was giving his recorded statement on October 14, he expressly requested an attorney, although he could not identify the part of the interview during which he allegedly made that request. Neither the videotape nor the transcript of the interview substantiates this claim.

b. *Analysis*

When Moore asked to talk to his attorney on October 8, the detectives were legally required to terminate the interrogation. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 (*Edwards*); *Bradford, supra*, 14 Cal.4th at p. 1034) There is no dispute on appeal that the detectives complied with that legal obligation. The dispute in this case pertains to whether Moore's subsequent waiver of his right to have an attorney present at the October 14 interrogation was valid.

Miranda establishes that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." (*Miranda, supra*, 384 U.S. at pp. 444, 475.) "The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*Moran v. Burbine* (1986) 475 U.S. 412, 421.)

In the trial court, the burden was on the prosecution to establish, by a preponderance of the evidence, that Moore's October 14 waiver of his right to counsel was valid. (*Bradford, supra,* 14 Cal.4th at p. 1034.) We affirm the trial court's finding that the People carried that burden.

The following circumstances establish that the waiver was voluntary. Although Moore asked to consult a lawyer during the October 8 interview, even then he expressed an intention to give the detectives additional information. Then, a few days later, Moore

initiated further communication by calling Detective Norton.[7] When the detectives responded to Moore's summons and went to talk to him on October 12, Moore gave them information pertinent to the Arroyo murder investigation and agreed that they could return and talk to him again after they looked into the matter. Subsequently, on October 14, Moore accompanied the detectives to the substation, accepting a free lunch on the way. Then, at the beginning of the October 14 interview, Moore unequivocally confirmed that he had contacted the officers and that he wanted to talk to them without an attorney present.

We also find, pursuant to the second prong of our inquiry, that Moore's waiver of his right to have counsel present during the October 14 interview was knowing and intelligent. "Such a knowing and intelligent waiver is 'a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."' [Citation.]" (*Bradford, supra,* 14 Cal.4th at p. 1034.) Here, in addition to the circumstances outlined above, we note that Moore had significant prior experience with the criminal justice system. It is very likely that he was familiar with his *Miranda* rights and how to use them. Indeed, he successfully terminated the October 8 interview by expressing the desire to consult with his attorney. He was advised at that time of the consequences of that choice and, thereafter made direct contact with the detectives without the assistance of or making any reference to an attorney.

Moore contends that his October 14 waiver was not voluntary, knowing or intelligent because the detectives tricked him. Relying exclusively on his own testimony from the pre-trial hearing, Moore contends that he asked for a lawyer before he left Santa

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[7] This fact is crucial to our conclusion that Moore's waiver was voluntary. A suspect like Moore who invokes his *Miranda* right to counsel can subsequently voluntarily waive that right only if he or she reinitiates contact with investigators. (*Edwards, supra,* 451 U.S. at p. 484-485 [An accused individual who has "expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."].)

Rita on October 14, the detectives told him that he was not entitled to a lawyer because he had contacted them, and, therefore, he believed he had no choice but to waive his right to have an attorney present at the October 14 interview.

We conclude that Moore's pre-trial testimony lacks sufficient credibility to outweigh the other circumstances surrounding the waiver issue.[8] The tape recording of Moore's October 12 phone call to Norton and the transcript of the October 14 interview both confirm that Moore called the detectives and told them he had information that he wanted to share with them. On neither occasion did he indicate in any way that he wanted an attorney present. Furthermore, at the beginning of the October 14 interview, Moore expressly acknowledged that he understood his *Miranda* rights and waived his right to have an attorney present. The videotape of that portion of the interview portrays an individual who appeared ready and willing, if not eager to talk with the detectives, who understood the *Miranda* rights that were read to him, and who knowingly and voluntarily waived those rights because he wanted to give the detectives information that might help his situation. Finally, as noted earlier, Moore expressly testified that he asked for an attorney during the recorded interview, however neither the transcript nor the videotape supports that claim.

To summarize, Moore's claim that the detectives ignored or refused to honor his request to have an attorney present at the October 14 interview is simply not supported by credible evidence. The preponderance of the evidence establishes that Moore voluntarily reinitiated contact with the detectives on October 12 and that he knowingly and intelligently waived his right to have an attorney present at the October 14 interview.

2. *The Right to Silence*

Moore contends that he repeatedly invoked his constitutional right to silence during the October 14 interview, and that the detectives violated that right by continuing the interrogation and eliciting incriminating admissions from him.

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[8] For reasons that are not clear, the trial court failed to make a ruling with respect to the question of Moore's credibility, notwithstanding its express acknowledgement that Moore's testimony directly conflicted with Godlewski's testimony.

Because Moore's trial counsel did not raise this issue in the court below, it is presented to us as a violation of the right to the effective assistance of counsel. For the sake of clarity, and because of the importance of the right to silence, we begin by directly addressing the constitutional issue itself and then consider whether the failure to raise this issue in the trial court constituted ineffective assistance of counsel.

a. *Guiding Principles*

"As *Miranda* itself recognized, police officers must cease questioning a suspect who exercises the right to cut off the interrogation. 'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.' [Citation.]" (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238, quoting *Miranda*, *supra*, 384 U.S. at pp. 473-474.)

"No particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent." (*People v Crittenden* (1994) 9 Cal.4th 83, 129 (*Crittenden*); see also *People v. Randall* (1970) 1 Cal.3d 948, 955, overruled on other ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510.) Rather, a suspect may invoke this right "by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely." (*Crittenden, supra,* 9 Cal.4th at p. 129; see also *People v. Burton* (1971) 6 Cal.3d 375, 382.) "Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context." (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 359-360 (*Peracchi*).)

b. *The October 14 Interrogation*

To facilitate our analysis and highlight the pertinent exchanges during the lengthy interrogation, we divide Moore's October 14 statement into three parts.

During part one of the interview, Moore told the detectives the story that he wanted to share with them, the story that led him to initiate further communication with them, i.e., that T and his friends put a hit out on Moore because they wanted to blame him for the Arroyo murder. Near the end of this first part of the interview, the detectives challenged Moore's story, saying it did not "add[] up." Godlewski said all the evidence

came back to Moore and that "we know Joe Moe was there." Moore's initial reaction was to confirm that "the car" was a green Mustang that belonged to Trez's girlfriend. But, as the detectives pushed for the truth, Moore became uncomfortable and, when they actually accused him of being the shooter, Moore said "Take me back to Santa Rita."

Part two of Moore's statement consisted of his conversation with Deputy Carroll. As noted above, after Moore asked to be taken back to Santa Rita, the detectives took Moore outside so he could have a cigarette. Several minutes later, Moore returned to the interview room accompanied by Deputy Carroll. On the videotape, Moore appears to be comfortable with, if not actually happy to talk with Carroll. Indeed, Godlewski testified at trial that Moore had seen Carroll when they were on the way to an outside smoking patio and expressly requested to talk with him. Then, on the way back to the interview room, Moore saw Carroll sitting in an office and asked again to talk with him.

After Carroll and Moore exchanged greetings, Moore asked whether Carroll remembered him and Carroll confirmed that he did. The two talked about a prior meeting and then Carroll asked Moore "what's the problem today?" Moore responded that some "niggers" wanted his "head" and that he "was there when somethin' happened." Without any questions from Carroll, Moore volunteered that witnesses saw him "there," the police knew he was there and that he knew what happened. Carroll responded "Uh-huh," and then Moore said "I mean but I didn't actually see it all transpire. I got out the car. Went to the car, but I didn't . . . tssst. They say they got me there though."

Carroll told Moore that it looked as though he wanted to talk to the detectives and encouraged him to do that and to just be "real" with them. When Moore complained that the officers were trying to say that he did it, Carroll said that Moore knew what really happened and that this was between Moore and God and that God would know if Moore was lying. He said that Moore should tell them the truth because they did not have time for games and "half-ass stories." Moore responded that he had not told half-ass stories, that he told them what happened, and then proceeded to tell Carroll details about the incident.

Moore told Carroll that, even though "[t]hey bammed Jeff," he was there and the witnesses saw him because he stands out. Carroll asked whether Moore had told the detectives that he was there and when Moore said that he hadn't, Carroll said that "at some point you got to be truthful." He encouraged Moore to be a man, to fess up and to tell the truth, to start a new life so his conscience would not feel bad. Moore responded that his conscience would always feel bad because "these niggas did it," and Moore did not say anything, and now the same people wanted to kill him too and, even though he did not say anything, they were trying to set him up. Carroll again encouraged Moore to talk to the detectives and tell the truth. Moore made a comment about how "they sell too," and said that he really did not care about "them niggas." Again, Carroll responded that Moore should tell the truth.

Part three of the interview commenced when Godlewski and Norton returned to the interrogation room after Carroll left. Norton asked Moore what he and Carroll had talked about. Moore said that he had come clean with Carroll, that he admitted he was there but that T was the one who "did it." Then Moore expressly admitted again that he had been present when Arroyo was killed, that he had been a passenger in the car with T, and that he had gotten out of the car at some point.

At that point, Norton encouraged Moore to get this "shit off his chest." Moore said "I want to talk to my broad first." Norton asked why, what about. He said Moore was more than half way there and that he should just finish it. Both detectives told Moore that T and his friends did not "give a fuck about him."

Moore said his name would be on paperwork and wanted to know how this would help his case. He also expressed fear that T would harm or kill his family. The detectives suggested they could arrange a "relocation" and Godlewski asked if Moore's mother would want to move back to Detroit or Chicago. Then the following exchange occurred:

"[Moore]: Yeah, but then she gonna get all what y'all doin' this for? What's, what's goin' on? See, see that's why I (unintelligible).

"[Godlewski]: Our thing is man?

"[Moore]: See, all I'm saying is man, I'd rather talk to my mama real quick, and my, my, my broad before I actually come and tell.

"[Godlewski]: You already have man.

"[Moore]: I, I want to see them first ok? I understand what you sayin'. I want to see them first though. I understand what you sayin' and everything, but I want to see them first. I want to see them first, before I say anything.

"[Godlewski]: Ok.

"[Moore]: I want to see them first, them two, them two right there.

"[Godlewski]: Are just the loves of your life? I understand that.

"[Moore]: I, man, I want to see them first though, before I say anything, before I say anything. So, if y'all take me back to Santa Rita now, if y'all can have them come, it's cool. Then I'll say, I tell what y'all want to be told, if y'all [unintelligible].

"[Godlewski]: What is it that, what, what, what, what is it that you need to see them right away, that . . .

"[Moore]: No, I just . . .

"[Godlewski]: 'Cause I mean we can arrange visits. That's not a problem.

"[Norton]: Have we, have we lied to you? We've been straight.

"[Godlewski]: When we been together.

"[Moore]: Well like I'm tellin' you right now, before I say anything to y'all about that, that's who I want to see first.

"[Godlewski]: All right, I understand what you're comin', where you're comin' from. But did, did that other policeman, Carroll did he say we were all right guys, did he say we were tryin' to?

"[Moore]: That's, why I'm askin' to see this right here. Like I said man, before I say anything to y'all, that's who I want to see first.

"[Norton]: Is that going to change anything?

"[Moore]: No.

"[Norton]: I mean we can make that happen, ok?

"[Moore]: All I'm doin' is just tell y'all that, that's, that's what I'm askin' y'all for?"

Norton assured Moore that he would make the visits happen, that it was no big deal and that Moore was in "good shape." Moore said that, once he told what he knew, he would still be in jail, and that it did not matter where he was held in Santa Rita, T would find him. The detectives said they would move Moore anywhere else he wanted. Moore asked if the detectives would move him and arrange the visits. The detectives said they would. But, they told Moore that he was there now, this was the third time they had talked to him and that it was time to "put it to rest man." After making assurances they would arrange the visit with his mother, both officers told Moore that they wanted to deal with the current matter first and they wanted him to tell them everything he knew. Then the following exchange occurred:

"[Moore]: Man I, I know what you're sayin' man. I need to see my mama first man before I say . . .

"[Godlewski]: Ok.

"[Moore]: My mama, my broad first. That's what I'm askin' y'all. I, I'm tell you what y'all want to know. I'm gonna tell ya. I ain't even gonna lie. I ain't gonna beat around the bush. I ain't gonna put in extra or nothing. If we can, if you can make those two things happen for me man? I tell you everything you want to know 'bout everything. I probably have some extra for you.

"[Godlewski]: You, see you know, you know we want to know about, we don't want to know about anything else. I mean we're (unintelligible) case.

"[Moore]: I know, I know, I know, and, and, and like I said, and like I said I, I'm tellin' you (unintelligible).

"[Godlewski]: Joe Moe . . .

"[Moore]: You may, I may I askin' you ready to take me man, I ain't trying to be rude sir (unintelligible).

"[Godlewski]: Take you where?

"[Moore]: Santa Rita, (unintelligible)

"[Godlewski]: Well hang on a second let's talk about this, let's . . .

"[Moore]: You know I'm tryin', I ain't tryin' to be here no more, sir."

Godlewski suggested they let Moore call his mother and girlfriend but he said they were not home. Godlewski said it sounded as if Moore did not trust them, to which Moore responded that he did not trust anyone. He said this was his life that was on the line. Then Norton made the following comment: "But listen to what I'm gonna say, ok? If we don't get the story tonight, we got to start makin' other moves, ok? And that means contactin' T and makin' moves and shit on him. Ok, and then you are potentially in danger. Not that we're ain't gonna protect you, 'cause we are. That's our job, that's part of our, of our definition of our job. But it's kinda forcin' our hand, is what I'm getting' at. Does that make sense?" Both officers reinforced the point that, now that Moore had revealed that T was the shooter, there was no other option but to go pick him up.

Moore then told the detectives that he had been with T and Trez when they "bounced" on Arroyo's car. During this part of the interview, Moore told the story about how he went to the driver's side of the car and T went to the passenger side. It was during this part of the interview that Moore also admitted that their intention was just to take the car, to commit a carjacking.

The detectives continued to ask questions, seeking clarification and further details about the crime. At one point, Moore repeated "I'm not tryin' to be here no more sir. No, no, no disrespect." Norton asked for a "couple more seconds," to which Moore responded "I want to see my broad and my mama." Norton reiterated that they would make that happened but then continued to ask more questions about the shooting incident.

Godlewski said that "one potential problem" with Moore's story was that they had witnesses who identified Moore as the guy who was picked up on the street after Arroyo was shot. Moore insisted that he did not do it. Norton asked if Moore could look him in the eye and say that he had told the complete truth. Moore responded that he was not lying and then said "Can, can, can we stop the discussion right now though? I understand you're gonna keep talkin' to me . . . but can we stop the discussion right now?" Norton

said they could and Moore asked "Can, you take me right now?" Shortly thereafter, the interview was finally terminated.

c. *Analysis*

Moore's first contention is that he invoked his right to silence at the end of part one of the October 14 interview, when he told the detectives to take him back to Santa Rita. Viewed in isolation, that statement could be construed as one that is "reasonably inconsistent with a present willingness to discuss the case freely and completely." (*Crittenden, supra*, 9 Cal.4th at p. 129.) Indeed, both detectives appeared to acknowledge this fact by letting Moore know they would stop asking questions and arrange to take him back to Santa Rita. However, Moore's own actions contradicted his words. First, he made a lengthy unsolicited statement about the crime itself while he was alone in the interrogation room, knowing that he was being video-recorded. Then, Moore asked to talk with Deputy Carroll, not once, but twice. At the very least, Moore's conduct rendered ambiguous his earlier request to return to Santa Rita.

"[I]f the defendant's invocation of the right to remain silent is ambiguous, the police may continue questioning for the limited purpose of clarifying whether he or she is waiving or invoking those rights, although they may not persist 'in repeated efforts to wear down his resistance and make him change his mind.' Once a defendant invokes his or her right to remain silent, that decision must be 'scrupulously honored.'" (*Peracchi, supra*, 86 Cal.App.4th at p. 360.)

In the present case, part two of the October 14 interview, the conversation between Moore and Deputy Carroll, clarified that Moore had not invoked his right to silence at the end of the first part of the October 14 interview. As noted above, Moore himself initiated the conversation with Carroll. Furthermore, during that brief and relatively open discussion, Moore never mentioned anything about wanting to leave or to stop talking about the case. Indeed, Moore volunteered many details about the incident without any prompting from Carroll. Moore's demeanor on the videotape was that of an individual who wanted to keep talking and who had a strong desire to convince the investigators that he did not shoot Arroyo. Therefore, "in light of all of the circumstances," and

considering the words used "in context" (*Peracchi, supra,* 86 Cal.App.4th at p. 359-360), we find that Moore did not invoke his right to remain silent when he asked to go back to Santa Rita at the end of part one of the interview.

Moore's second and better argument is that he invoked his right to silence during part three of the October 14 interview by repeatedly informing the detectives that he wanted to see his mother and girlfriend *before* he talked to them about the details of the crime.

"There are certain words and conduct that are inconsistent per se with a present willingness to discuss one's case freely and completely with the police. Thus, a request for an attorney automatically invokes the right to have questioning cease. Similarly, it has been held that a minor's request to talk to his parents automatically invokes the Fifth Amendment privilege. [Citations.] However, no per se rule applies . . . where an adult asks to talk to someone *other* than an attorney. In such a case, the court must look to the totality of circumstances surrounding the interrogation to determine whether the request was in fact an invocation of the privilege of silence. [Citations.]" (*People v. Soto* (1984) 157 Cal.App.3d 694, 705 (*Soto*))

In the present case, the totality of the circumstances compel us to conclude that Moore did invoke his right to silence by repeatedly asking to see his mother and girlfriend before disclosing additional details about the Arroyo murder. Initially, the detectives tried to convince Moore to talk first and see his family later, but Moore was adamant that he wanted to see them first. Indeed, he manifested his desire to terminate the interview, at least for the time being, by asking the detectives to take him back to Santa Rita so that he could meet his family there. This time, in contrast to Moore's statement at the end of part one of the interview, Moore's request to go back to Santa Rita was absolutely consistent with his conduct. That request, his repeated pleas to see his family before he talked any more about the case and his general demeanor on the videotape were all consistent with his obvious desire to stop the interview.

Soto, supra, 157 Cal.App.3d 694, reinforces our conclusion. In that case a jury convicted the 19-year-old defendant of the second degree murder of a 16-year-old female

acquaintance, based in part on a confession obtained after the defendant repeatedly asked to call his mother. The *Soto* court reversed, finding that the defendant had invoked his constitutional right to remain silent before he made his confession. The following factors led the court to this conclusion: (1) defendant's requests were repeated and insistent; (2) the words the defendant used indicated a present unwillingness to continue responding to questions at that time; (3) the interrogators' responses to the defendant's requests conveyed the message that the defendant had irrevocably waived his right to remain silent and that he had no choice but to continue to answer questions until the whole truth was told; (4) no *Miranda* warnings were given or waiver obtained after the requests were made; (5) the interrogators used coercion and deception during the lengthy interview; and (6) the defendant did not have experience dealing with police and was somewhat unsophisticated. (*Id.* at pp. 707-710.)

Virtually all of the *Soto* factors are present in this case. Moore made repeated requests to talk to his mother and his girlfriend and the words he used clearly conveyed that he wanted the interrogation to halt until after he could have those meetings. Although the detectives did not expressly tell Moore he had to keep talking, they tried to make him feel like he had an obligation to finish telling the entire story during that interview. They asked him to wait, they complained that they had already wasted time interviewing him on other occasions, and they continued to press him for details about the crime. They did not repeat *Miranda* warnings after Moore asked to talk to his mother and girlfriend. Nor did they in any implicit way acknowledge that Moore still had those rights. Furthermore, and most disturbing to us, when Moore did not yield, the detectives employed coercion by warning Moore that if he refused to answer their questions, they would go and arrest T, the man who had already put a hit out on Moore and who Moore feared would retaliate against him and his family.

Unlike the *Soto* defendant, Moore did have a criminal past and significant prior experience dealing with police. However, Moore's lack of sophistication and poor judgment were also palpable. Thus, under the circumstances, we cannot find that Moore's prior experience with the criminal justice system outweighs the numerous other

circumstances which strongly indicate that his repeated requests to talk to his mother and girlfriend at that time were an invocation of his constitutional right to remain silent.

The People characterize Moore's s requests as ambiguous and equivocal. They attempt to portray Moore as an individual who constantly changed his mind, pointing out that he terminated the October 8 interview, but then asked to talk to the detectives again, and that he answered questions on October 14, then asked to go back to Santa Rita, only to change his mind minutes later when he asked to talk to Carroll. These prior instances of equivocation may have been relevant if there was something ambiguous about Moore's conduct during part three of the interview. But we do not think the People can properly use that prior conduct to inject ambiguity into a scenario where there was none. Moore clearly and repeatedly stated that he did not want to share additional details about the murder until after he was allowed to meet with his mother and girlfriend.

Furthermore, even if we could be persuaded that Moore's requests to talk to his mother and girlfriend were ambiguous, the detectives would have been authorized to continue questioning him only "for the limited purpose" of clarifying whether he was invoking his right to silence. (*Peracchi, supra*, 86 Cal.App.4th at p. 360.) Here, the detectives did no such thing. Instead, they crossed the line and violated Moore's rights by their "'repeated efforts to wear down his resistance and make him change his mind.'" (*Ibid.*) When even those efforts failed, the detectives resorted to coercion. Norton told Moore that if they did not "get the story tonight," they would arrest T and "then you are potentially in danger." Although Norton also said that they would protect Moore because that was their job, the threat of physical harm if Moore refused to talk was implicit and the message was received, loud and clear. Indeed, Moore responded to it almost immediately by admitting that he actively participated in the attempted carjacking that resulted in Arroyo's death.

We find that Moore did invoke his constitutional right to silence during part three of the October 14 interview by asking to meet with his mother and girlfriend before answering the detectives' questions about the details surrounding Arroyo's murder.

3. *The Right to Effective Assistance of Counsel*

Moore contends that he was denied the effective assistance of counsel because his trial counsel failed to challenge the admissibility of the October 14 statement on the ground that the detectives violated Moore's constitutional right to silence. To prove an ineffective assistance claim, Moore carries the burden of rebutting, by a preponderance of the evidence, a presumption that he received effective assistance, first by showing that trial counsel's performance was deficient, and then by establishing prejudice. (*People v. Garrison* (1989) 47 Cal.3d 746, 786; *People v. Ledesma* (1987) 43 Cal.3d 171 (*Ledesma*).)

The first prong of this test is easily satisfied. Counsel's performance was deficient if it fell "'below an objective standard of reasonableness . . . under prevailing professional norms.' [Citations.]" (*Ledesma, supra,* 43 Cal.3d at p. 216.) In applying this prong of the test, we are required exercise deferential scrutiny so as to avoid the dangers of "'second-guessing.'" (*Ibid*.) However, under the circumstances, we can conceive of no reasonable explanation for trial counsel's failure to raise this issue in the lower court.

However, the record before us precludes Moore from satisfying the second prong of the ineffective assistance test. "[T]o be entitled to reversal of a judgment on grounds that counsel did not provide constitutionally adequate assistance, [Moore] must carry his burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.) "'The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" (*Ledesma, supra,* 43 Cal.3d at pp. 217-218.)

In the present case, the consequence of Moore's trial counsel's error was that the jury heard the portion of the October 14 interview that occurred after Moore invoked his right to silence. During that part of the interview, Moore revealed for the first time that, during the course of an attempted carjack, he approached the driver's side of Arroyo's car

and touched the door handle while T went to the passenger side with the .45. Although Moore's "two people approached the car" story was certainly not intended to be a confession, it was nonetheless incriminating and it should not have been admitted into evidence at trial. Notwithstanding this fact, we find the error was not prejudicial for several reasons.

First, Moore made so many incriminating statements that were properly admitted into evidence at this trial. During the October 8 interview, Moore admitted that he had touched the driver's side door handle of Arroyo's car (although he claimed he did so on an earlier occasion). During part one of the October 14 interview, Moore admitted that T had paid him to rob Arroyo's stepson with the .45 gun that he had previously sold to T, that the .45 was probably also used to kill Arroyo, that Arroyo was probably accidentally killed during an attempted carjack, and that T and other unnamed assailants were probably driving a Teal Mustang that belonged to Trez or Trez's girlfriend. Further, when Moore was alone in the interrogation room, he made a lengthy statement about how T was the shooter, which was very incriminating because it conveyed accurate details about the crime. Then, during part two of the October 14 interview, Moore admitted to Carroll that he was "there" at the murder scene, that he "got out the car," meaning the Mustang, and that he "went to the car," meaning Arroyo's car. At the beginning of part three of the interview, before he invoked his right to silence, Moore again expressly admitted that he was at the scene of the Arroyo murder, and that he got out of the Mustang.

Second, Moore seriously undermined his own credibility during portions of interviews that were properly admitted into evidence at trial. For example, during the October 8 interview, Moore acted surprised to learn about Arroyo's murder and claimed complete ignorance about that matter. However, as reflected in the previous paragraph, Moore subsequently revealed that he actually knew quite a bit about the details of the murder. Furthermore, Moore's phone calls to his girlfriend and to Marc Rogers were evidence that he was trying to cover up his connection to the crime.

Third, the testimony of three credible witnesses established that only one person committed the crime that resulted in the death of Jeff Arroyo. Not only did Moore fit the description of the assailant, he expressly admitted more than once that he was at the murder scene and that he got out of the Mustang. Moore also admitted to Carroll that, after he got out of the Mustang, he went over to Arroyo's car.

Fourth, two of the witnesses, Maldonado and Hernandez, testified that Arroyo's assailant got into the passenger side of Arroyo's car. Moore's fingerprints were on the slip of paper in the wallet found on the passenger floorboard of Arroyo's car.

Fifth, Maldonado and Hernandez saw a man get out of the passenger side of the car and walk around to the driver's side. And, Hernandez actually saw the person open the driver's door. The DNA evidence established that Moore touched the door handle on the driver's side of Arroyo's car.

Sixth, after appellant was arrested, he called his mother and made statements that could reasonably be construed as a confession of murder.

All these circumstances compel the conclusion that the evidence of Moore's guilt was overwhelming. Thus, although we are extremely concerned by the constitutional violation that occurred, we are quite certain that the exclusion of statements that Moore made after he invoked his constitutional right to silence would not have altered the outcome of this case.

B. *Voluntariness*

Moore separately contends that, even if there was no *Miranda* violation, the entire October 14 statement should have been excluded because it was involuntary. Because we have already found that there was a *Miranda* violation during part three of the interview, we limit our analysis of this distinct claim of error to the first two parts of the interview and the very small portion of part three of the interview that was conducted before Moore invoked his constitutional right to silence.

Miranda aside, an involuntary statement is inadmissible under the due process clauses of the state and federal constitutions. (*People v. Weaver* (2001) 26 Cal.4th 876, 921 (*Weaver*); *People v. Lucas* (1995) 12 Cal.4th 415, 441-442.) On appeal, we

independently determine whether the statement was voluntary. (*People v. McClary* (1977) 20 Cal.3d 218, 227, overruled on other grounds in *People v. Cahill, supra,* 5 Cal.4th at pp. 509-510, fn. 17.) "[B]ut, to the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence." (*Weaver, supra*, 26 Cal.4th at p. 921.)

"Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances.' [Citations.]" (*People v. Neal* (2003) 31 Cal.4th 63, 79.) """Among the factors to be considered are '"the crucial element of police coercion [citation]; the length of the interrogation [citation]; its location [citation]; its continuity" as well as "the defendant's maturity [citation]; education [citation]; physical condition [citation]; and mental health."' [Citation.]""" (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1202.)

Moore attempts to convince us that his entire October 14 statement was involuntary by constructing a version of the facts based solely on his pre-trial testimony. He maintains that he asked for an attorney but his request was denied, that the detectives tricked him into believing that he did not have a right to an attorney because he contacted them, and that he was taken from Santa Rita to the substation against his will.

As part of our *Miranda* analysis, we rejected Moore's pretrial testimony as not credible. In this context, we are *required* to accept the version of the facts most favorable to the People if supported by substantial evidence. (*Weaver, supra*, 26 Cal.4th at p. 921) Godlewski's pretrial testimony constitutes substantial evidence that Moore initiated contact with the detectives on October 12 by asking to meet with them so that he could share some information, that Moore did not ask for an attorney on October 12, that Moore did not ask for an attorney on October 14, and that Moore voluntarily accompanied the detectives to the substation on October 14 so that he could give a tape recorded statement. These facts require us to summarily reject Moore's self-serving version of these same events.

Moore also contends that the detectives pressured and tricked him into talking by sending in Carroll, who was African-American, and that Carroll manipulated him and

attempted to "break [his] will" by appealing to God. First, we reject Moore's factual claim that the detectives sent Carroll to talk to Moore because Carroll was African-American. Substantial evidence establishes that Moore saw Carroll at the station, recognized him and asked to talk with him. Second, Moore's contention that he was somehow manipulated by Carroll's reference to God rings hollow. Moore's only verbal response to the comment that God would know if Moore was telling the truth was "Uh-huh." Further, the videotape of the interview shows that Moore had no strong reaction to this brief reference to God. In other words, the evidence before us confirms that Carroll never made any attempt to exploit some religious belief in order to manipulate Moore.

Moore complains that the detectives lied to him about the evidence against him by telling him that his fingerprints were on the car (before they knew that to be true) and that there were eyewitnesses who identified him. Deception regarding the evidence is permissible, however, so long as it is "not '"of a type reasonably likely to procure an untrue statement."'" (*People v. Jones* (1998) 17 Cal.4th 279, 299; see also *People v. Farnam* (2002) 28 Cal.4th 107, 182.) Here Moore does not even contend that the detectives' statements were likely to procure an untrue statement.

Moore suggests that he was particularly vulnerable during the interrogation by pointing out that he never graduated from high school, he was on pain medication because he had recently been shot, and he was withdrawing from Ecstasy. These circumstances, unaccompanied by any meaningful analysis, are insufficient to establish involuntariness. Our due process inquiry focuses on the alleged wrongful and coercive actions of the state, not on the mental state of the defendant (*Weaver, supra,* 26 Cal.4th at p. 922), and we find no evidence in the record before us that the detectives made any attempt or effort to exploit the personal characteristics that Moore now claims made him vulnerable.

Finally, Moore claims that he was afraid for his own physical safety and the safety of his family. This circumstance cuts two ways. As we have already fully discussed above, the detectives did improperly exploit Moore's fear during part three of the interview after Moore invoked his right to silence by threatening to arrest T if Moore did

not tell the whole story. However, in this context, Moore's underlying fear of T and his friends, a fear that the detectives did not create, supports a voluntariness finding because the record clearly demonstrates that Moore's fear motivated him to reinitiate contact with the detectives and to give the October 14 statement.

For all these reasons, we hold that the totality of the circumstances establish that the portion of Moore's October 14 statement that was given before he invoked his right to silence was voluntary.

C. *Admission of Preliminary Hearing Testimony*

Moore contends that the trial court violated his federal constitutional right to confront witnesses against him by admitting evidence of Aaron Meyers' preliminary hearing testimony.

"[A] witness's previous testimony against a criminal defendant may be admitted at trial if the witness is unavailable, and the defendant had the opportunity at the previous hearing to cross-examine the witness with an interest and motive similar to that at trial." (*People v. Smith* (2003) 30 Cal.4th 581, 623 (*Smith*).) Prior testimony that satisfies these three conditions, witness unavailability, similar prior interest and motive and similar opportunity to cross-examine, falls squarely within a statutory exception to the hearsay rule. (See Evid. Code, § 1291, subd. (a)(2).) Furthermore, the defendant's prior opportunity to cross examine with a similar motive and interest satisfies the requirements of the confrontation clause. (See U.S. Const., 5th & 14th Amends.; *Crawford v. Washington* (2004) 541 U.S. 36, 53-56, 59.)

In the present case, Moore does not challenge the trial court's finding that Meyers was unavailable to testify at trial. Nor does he dispute that a criminal defendant's interest and motive for cross-examination are similar at a preliminary hearing and at trial. (See e.g. *Smith, supra,* 30 Cal.4th at pp. 611, 623-625.) Rather, Moore's sole contention is that his confrontation right under the federal Constitution was violated because he did not have the same *opportunity* to cross-examine Meyers at the preliminary hearing that he would have had if Meyers had testified as a witness at trial.

The argument presented in appellant's opening brief is purely statutory. Moore contends that the procedures governing preliminary hearings in California do not afford defense counsel the same opportunity to cross-examine witnesses that they would enjoy at trial because of the passage of Proposition 115, the "Crime Victims Justice Reform Act," which was adopted by California voters in 1990. (See generally *Whitman* v. *Superior Court* (1991) 54 Cal.3d 1063 (*Whitman*).)

After Proposition 115 passed, provisions were added to the California Constitution and the Penal and Evidence Codes which altered the preliminary hearing procedure in California. (*Whitman, supra,* 54 Cal.3d at p. 1072.) One such provision, section 866, states, in part: "It is the purpose of a preliminary examination to establish whether there exists probable cause to believe that the defendant has committed a felony. The examination shall not be used for purposes of discovery." (§ 866, subd. (b).) Moore contends that "[s]ince preliminary hearings are now limited and are not to be used for discovery, it cannot reasonably be said that the opportunity for cross-examination offered at a preliminary hearing is sufficient to satisfy a defendant's right to confrontation." Moore's sole authority for this proposition is *Whitman, supra,* 54 Cal.3d 1063.

In *Whitman,* our Supreme Court heard a constitutional challenge to a provision in Proposition 115 that authorized the admission of hearsay testimony by law enforcement officials at preliminary hearings. The court held, among other things, that allowing hearsay testimony at post-Proposition 115 preliminary hearings does not violate the criminal defendant's federal confrontation clause right. (*Whitman, supra,* 54 Cal.3d at pp. 1080-1082.) The court reasoned that "the new, limited form of preliminary hearing in this state sufficiently resembles the Fourth Amendment probable cause hearing . . . to meet federal confrontation clause standards despite reliance on hearsay evidence." (*Id.* at p. 1082.)

Whitman simply does not support Moore's claim that his confrontation right was violated in this case. *Whitman* addresses the constitutionality of hearsay rules which are not at issue here; Aaron Meyers appeared in person and was subject to cross-examination at the preliminary hearing. The *Whitman* court did not hold nor intimate that Proposition

115 had any material adverse impact on the defendant's opportunity to cross examine witnesses at the preliminary hearing.

Moore maintains that *Whitman* does support his claim of error by establishing that post-Proposition 115 preliminary hearings were given a "new, limited form." (*Whitman, supra*, 54 Cal.3d at p. 1082.) In our view, however, the court's acknowledgment that preliminary hearings took on a more limited form after 1990 cannot properly be divorced from its substantive conclusion which was that this new procedure does *not* violate the confrontation clause. Viewed from this perspective, *Whitman* supports the conclusion that the opportunity for cross-examination at the preliminary hearing in California satisfies confrontation clause concerns. (See *People v. Lepe* (1997) 57 Cal.App.4th 977 (*Lepe*), disapproved on other ground in *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

In *Lepe*, a case that neither party addresses, the appellant argued that preliminary hearings conducted after the passage of Proposition 115 do not afford the defendant "'the right nor the opportunity to cross-examine the declarant with an interest and motive similar to that which he would have had at trial.'" (*Lepe*, *supra*, 57 Cal.App.4th at p. 982,) The *Lepe* court rejected this contention for the following reason: "While the post-Proposition 115 preliminary hearing may not be used as a discovery device, and while the changes in the form of the hearing were significant, our Supreme Court held in *Whitman* that it does not violate the confrontation clause . . . ." (*Id*. at p. 983.)

Moore fails to explain how or why he believes that section 866 precludes meaningful cross-examination of witnesses at preliminary hearings. He cannot establish a confrontation clause violation simply by identifying a distinction between the examination procedure at a prior proceeding and at trial. "Admission of the former testimony of an unavailable witness is permitted under Evidence Code section 1291 and does not offend the confrontation clauses of the federal or state Constitutions--not because the opportunity to cross-examine the witness at the preliminary hearing is considered an exact substitute for the right of cross-examination at trial [citation], but because the interests of justice are deemed served by a balancing of the defendant's right

to effective cross-examination against the public's interest in effective prosecution. [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 975.)

In his reply brief, Moore essentially abandons his statutory argument by conceding that "our Supreme Court has in several cases found that a defendant's opportunity to cross-examine at the preliminary hearing satisfied the Confrontation Clause . . . ." Nevertheless, he maintains that his confrontation right was violated in this case because his trial counsel was actually prevented from conducting a meaningful cross-examination of Aaron Meyers at the preliminary hearing in this case. Moore has improperly raised this new issue in a reply brief. In any event, this claim of error is legally and factually unsound.

Moore mischaracterizes the nature of his confrontation right by attempting to charge this court with an obligation to ensure that the cross-examination of Meyers at the preliminary hearing was sufficiently thorough. Controlling state and federal Supreme Court authority establishes that "'when a defendant has had an opportunity to cross-examine a witness at the time of his or her prior testimony, that testimony is deemed sufficiently reliable to satisfy the confrontation requirement [citation], regardless whether subsequent circumstances bring into question the accuracy or completeness of the earlier testimony.'" (*Lepe*, *supra*, 57 Cal.App.4th at pp. 983-984 quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 851; see also *People v. Harris* (2005) 37 Cal.4th 310, 333; *California v. Green* (1970) 399 U.S. 149.)

Our concern is whether the defendant was given the opportunity for effective cross-examination, not whether he availed himself of that opportunity. "'As long as defendant was given the *opportunity* for effective cross-examination, the statutory requirements were satisfied; the admissibility of this evidence did not depend on whether defendant availed himself fully of that opportunity. [Citations.]' [Citations.] Moreover, 'the admission of . . . testimony under Evidence Code section 1291 does not offend the confrontation clause of the federal Constitution simply because the defendant did not conduct a particular form of cross-examination that in hindsight might have been more effective.' [Citations.]" (*People v. Wilson* (2005) 36 Cal.4th 309, 346 (*Wilson*).)

Moore contends that our Supreme Court has held that "in some cases an appellate court may need to 'explore the character of the actual cross-examination to ensure that an adequate opportunity for full cross-examination has been afforded to the defendant.'" (Quoting *People v. Valencia* (2008) 43 Cal.4th 268, 294 (*Valencia).*) This contention is very misleading. A reviewing court will explore the actual cross-examination of the witness at the prior proceeding only in an "extraordinary case," (*Valencia, supra,* 43 Cal.4th at p. 294) when "unusual circumstances" warrant such an exercise. (*Wilson supra,* 36 Cal.4th at p. 346-347.)

In *Valencia, supra,* 43 Cal.4th at page 294, appellant argued that the trial court violated his confrontation right by admitting the preliminary hearing testimony of a witness at the penalty phase of his murder trial because the lower court's rulings at the preliminary hearing precluded him from fully confronting the witness who later became unavailable to testify at trial. The *Valencia* court held that the trial court's "minor rulings at the preliminary hearing did not make the previous testimony inadmissible." The court supported this holding with the following reasoning: "We have recognized that in an extraordinary case, it might be '"necessary to explore the character of the actual cross-examination to ensure that an adequate opportunity for full cross-examination had been afforded to the defendant."' [Citations.] This is no such extraordinary case. The few relevance objections the court sustained did not deprive defendant of a reasonably full opportunity to cross-examine." (*Valencia, supra,* 43 Cal.4th at p. 294.)

Moore does not contend that this is an extraordinary case. Nor does he identify any unusual circumstance that might require us to explore the character of the actual cross-examination of Aaron Meyers. Indeed, Moore does not identify a single trial court ruling that was made during Meyers' preliminary hearing testimony that allegedly restricted Moore's ability to cross-examine that witness. Instead, he resorts to conjecture by arguing that rulings the trial court made while other witnesses testified at the hearing implicitly "preemptively curtailed counsel's cross-examination of Meyers . . . ." We simply are not persuaded by this self-serving speculation.

For all these reasons, we find that Moore has failed to establish that his federal constitutional right to confront witnesses against him was violated in this case.

D. *The Prosecutor's Conduct*

Moore seeks reversal of the judgment on the ground of prosecutor misconduct. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

In this case, Moore contends that statements that the prosecutor made during his rebuttal argument to the jury rendered the trial fundamentally unfair because they amounted to an argument that the jury should find Moore guilty of the Arroyo murder "because he was an admitted armed robber."

1. *Background*

During his closing argument, the prosecutor's primary theory was that Moore was guilty of first degree murder because he killed Arroyo during the course of a robbery or an attempted robbery. His review of the evidence was tailored to support this theory. However, he also argued that a conviction could be based on the alternative theories that Moore either committed a premeditated murder, or that Moore was an aider and abettor of the felony murder if the jury believed that Aaron Meyers was the shooter.

During his closing argument, defense counsel attempted to chip away at the People's case and to convince the jury that there was insufficient evidence to support a finding that Moore committed murder. Counsel urged the jury to view the evidence from the perspective that Moore lived in a "parallel" world where people committed crimes and followed a different set of rules. From this perspective, defense counsel argued, it was clear that Moore's statements to police were lies because lying to police was the "code of the criminal." However, defense counsel attempted to convince the jury that Moore's trial testimony was credible because it was spontaneous. Counsel argued:

"When Mr. Moore was on the witness stand in response to questions by the District Attorney offered for the purpose of impeachment, you were involved in robberies, weren't you? Yeah. You're a robber? He says yeah, I'm a robber, but I'm not a killer. Spontaneously one right after the other. That brings that ring of truth into what he says when he says he wasn't involved. That is what you can look at, that spontaneous statement, to consider and give serious credibility to Mr. Moore."

Later during his argument, defense counsel reiterated that credible testimony established that Moore was a robber but not a killer by making this argument: "During cross-examination Mr. Moore readily admitted yes, I've committed robberies, but that's his business in the criminal world. Other people in the criminal world sell dope. Other people in the criminal world do killings for money. Other people have other professions in the criminal world. Joe Moore does robberies. Remember what he said spontaneously in answer to that question. I do robberies, but I'm not a killer. And you heard him from the witness stand, and you can judge his credibility."

The prosecutor began his rebuttal closing argument by offering the following response to the defense theory that Moore was a robber but not a murderer: "So I just have a few things I want to cover in response to what [defense counsel] said, and with regards to what [defense counsel] said, there's definitely one thing that I agree with him on. And that is that the defendant is a robber. That is what he does. He said it on the stand. He can't even count how many he has done, as if that is some consolation." The prosecutor reminded the jury of the felony murder rule and that robbery was an inherently dangerous crime that could lead to death "especially when they're committed the way the defendant commits them, with a gun." The prosecutor pointed out that the reason to rob a person with a gun is to scare them, but also so that you can kill them if they resist which, the prosecutor argued, was what happened here: Arroyo resisted and Moore murdered him. The prosecutor concluded "[s]o yes, I agree, he's a robber, but that's no consolation."

Near the end of his rebuttal, the prosecutor made the following statement: "Ladies and gentlemen, the murderer is sitting right here. The murderer of Jeff Arroyo is sitting

right here in this room. And here's the other thing about the distinction between murderer and robber. I rob people, but I'm not a murderer. If you rob people with guns, you're not too far away. Okay. [¶] And what is robbery? Robbery is taking property by force from someone. Taking property that you are not entitled to. What is murder? Taking the life of someone that you are not entitled to take. And what is he asking you for right now? A verdict, a verdict that he's not entitled to."

2. *Analysis*

As noted above, Moore characterizes the prosecutor's rebuttal argument as telling the jury to find Moore guilty of murder because he admitted he was an armed robber. Moore contends that making this argument was egregious misconduct because it was "exactly the kind of propensity inference that Evidence Code section 1101 prohibits."

"'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner.' [Citation.] 'Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide. [Citation.]' [Citation.] In order to preserve an appellate claim of prosecutorial misconduct, a defendant must make a timely objection at trial and request an admonition; otherwise, a claim is reviewable only if an admonition would not have cured the harm caused by the misconduct. [Citation.]" (*Wilson, supra,* 36 Cal.4th at p. 337.)

In the present case, Moore's trial counsel did not object to the prosecutor's allegedly offensive argument. On appeal, Moore contends this omission constituted ineffective assistance of counsel. We disagree. We find that defense counsel did not perform deficiently by failing to object because the prosecutor did not commit misconduct during his rebuttal argument.

The rebuttal comments that referenced Moore's other robberies were all direct responses to the defense contention that Moore was a professional robber but not a murderer. Defense counsel had just expressly told the jury that Moore lived in the criminal world and that his job there was to commit robberies but not to kill people. The

prosecutor disputed that statement, relying on the facts and evidence that had been presented to the jury during the trial. In other words, the prosecutor's statements were case specific and did not in any way suggest that Moore could be convicted based on evidence of unrelated criminal behavior.

Moore contends that, because the prior robberies were admitted "solely as impeachment evidence," the "only proper argument the prosecutor could make was that, because appellant was an admitted robber, his testimony and/or prior statements should be disbelieved." This argument rests on an inaccurate factual premise. Evidence of Moore's other robberies was admitted not just for impeachment but as part of his prior statements. For example, during his October 14 statement Moore admitted that he previously used the murder weapon to conduct an armed robbery of the victim's stepson. Also, during the October 14 phone conversation with his father, Moore talked about a "lick" that he did and the fact that he had to start carrying "thumpers." As Moore acknowledged during his trial testimony, a lick is a robbery and a thumper is a gun. Furthermore, Moore completely ignores that he attempted to use evidence of his prior robberies to his own advantage by mounting the defense that he was a robber but not a killer.

"'"'"[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] . . . "A prosecutor may 'vigorously argue his case and is not limited to "Chesterfieldian politeness"' [citation], and he may "use appropriate epithets . . . ."' [Citation.]'"'"' (*People v. Hill* (1998) 17 Cal.4th 800, 819-820.)

When evaluated against these rules of conduct, we find that the prosecutor's rebuttal closing argument was not improper. All of the prosecutor's references to prior robberies were "'"'"fair comments on the evidence,'"'"' (*Hill, supra,* 17 Cal.4th at p. 819) and he did not state nor suggest that the jury should find Moore guilty of the Arroyo murder because he was an admitted armed robber.

E. *Jury Instructions*

1. *CALCRIM No. 358*

The jury was instructed with the following version of CALCRIM No. 358: "You have heard evidence that the defendant made oral statements before the trial. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give such statements. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

Moore contends the cautionary language in the last sentence of this instruction is erroneous because it tells the jury to view with caution oral statements by the defendant that are exculpatory in nature.

"'When evidence is admitted establishing that the defendant made oral admissions, the trial court ordinarily has a sua sponte duty to instruct the jury that such evidence must be viewed with caution.' [Citation.]" (*People v. Williams* (2008) 43 Cal.4th 584, 639 (*Williams*).) Because the purpose of this cautionary instruction is to help the jury determine whether the statement was actually made, it should not be given if "'the oral admission was tape-recorded and the tape recording was played for the jury.'" (*Ibid*; see also *People v. Slaughter* (2002) 27 Cal.4th 1187, 1200 (*Slaughter*).) An instruction to view a defendant's admissions with caution does not raise due process or fair trial concerns because it is limited to inculpatory statements by the defendant. (*Williams, supra*, 43 Cal.4th at pp. 639-640; *Slaughter, supra*, 27 Cal.4th at p. 1200; see also *People v. Vega* (1990) 220 Cal.App.3d 310, 317-318.) "'To the extent a statement is exculpatory it is not an admission to be viewed with caution. [Citation.]' [Citation.]" (*Slaughter, supra*, 27 Cal. 4th at p. 1200.)

The cautionary language in the instruction quoted above is not limited to inculpatory statements made by the defendant but instead expressly instructs that all of the defendant's oral statements should be considered "with caution." Therefore, giving this instruction was error.

The People contend that "CALCRIM No. 358 is substantially similar to CALJIC No. 2.71, an instruction California courts repeatedly found proper." However, the People refuse to acknowledge that CALJIC No. 2.71 limits its cautionary advise to the defendant's inculpatory statements. (See *People v. Vega*, *supra*, 220 Cal.App.3d at p. 317; see also *Slaughter*, *supra*, 27 Cal.4th at p. 1200; *Williams*, *supra*, 43 Cal.4th at pp. 639-640.)

Furthermore, the People (and Moore) overlook the fact that CALCRIM No. 358 was revised in 2008, after Moore's trial in this case, and that the cautionary language at the end of the instruction now states: "Consider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded." This revision reinforces our conclusion that the cautionary language in the prior version of CALCRIM No. 358 that was given to the jury in this case was erroneous.

Although we find that the version of CALCRIM No. 358 that was used at this trial contained an erroneous cautionary instruction, we also conclude that it is not reasonably probable that the outcome of this trial would have been different absent the error. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) This instruction was erroneous only to the extent its cautionary language applied to non-recorded exculpatory statements by the defendant. However, Moore fails to identify any such statement. As best we can determine, all of Moore's non-recorded out of court statements were inculpatory.

Moore contends that "some" of his oral statements were exculpatory, but the only conversation he references was the phone call to his mother on the day he was arrested. That hearsay evidence was admitted through the testimony of Detective Godlewski because Moore's comments that "All the evidence and witnesses point to me," "Because I did it," and "I'm sorry Momma," were admissions. The cautionary instruction applied to those statements and clearly protected Moore.

Moore contends that he presented evidence that what he actually said to his mother was that "'they,' meaning Meyers and his friends, said that appellant had murdered Arroyo." This evidence, presented through the trial testimony of Moore's

mother, made the cautionary instruction particularly appropriate because it created a conflict in the evidence about the "'exact words used, their meaning, or whether the admissions were repeated accurately.'" (*People v. Dickey* (2005) 35 Cal.4th 884, 905.) However, Stephanie Moore's testimony did not alter the inculpatory nature of the underlying statements. Indeed, even if we could be persuaded to view her testimony in isolation, there is nothing exculpatory about the statement "Mom, they said I did it."

Moore also complains that, because this instruction told the jury to view all of his unrecorded statements with caution, it is reasonably likely they interpreted it to mean that they should therefore accept any recorded statements as true. This logic is unsound. As noted above, the purpose of this cautionary instruction is to help the jury determine whether the statement was actually made, not whether it was true. If the statement was recorded, the statement was made and the cautionary language does not apply. The instruction given in this case accurately reflects this fact.

Nothing in the cautionary language, nor any other part of CALCRIM No. 358 could be reasonably interpreted to mean that the jury should uncritically accept recorded statements by the defendant as true. In this case in particular, in light of the fact that so many of Moore's recorded statements were inconsistent with each other, there is no possibility, reasonable or otherwise, the jury could have misconstrued this instruction in the way Moore now contends.

2. *CALCRIM No. 361*

The trial court instructed the jury with CALCRIM No. 361 which states: "If the defendant failed in his testimony to explain or deny evidence against him and if he could reasonably be expected to have done so based on what he knew, you may consider his failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. If the defendant failed to explain or deny, it's up to you to decide the meaning and importance of that failure."

Moore contends that CALCRIM No. 361 is an invalid and improper instruction because it lacks content, serves no purpose and fails to provide the jury with adequate

guidance as to how to use evidence. We disagree. Neither party has identified any published case which addresses this relatively new instruction. However, CALCRIM No. 361 addresses the same subject and is substantially similar to CALJIC No. 2.62. Our Supreme Court has held that CALJIC No. 2.62 does not suffer any constitutional or other infirmity. (*People v. Saddler* (1979) 24 Cal.3d 671 (*Saddler*).). Like CALJIC No. 2.62, CALCRIM No. 361 serves an important function of conveying to the jury the "well settled rule that a defendant who takes the stand and testifies in his behalf waives his Fifth Amendment privilege [citation] and his state constitutional privilege to the extent of the scope of relevant cross-examination." (*Saddler, supra,* 24 Cal.3d at p. 679.)

CALCRIM No. 361 also protects the defendant in at least two important ways. First, it tells the jury that it may consider a testifying defendant's failure to explain or deny evidence, only if "he could reasonably be expected to have done so based on what he knew." Second, it reiterates and reinforces that, a defendant's failure to explain or deny evidence is "not enough by itself to prove guilt," and that "[t]he People must still prove each element of the crime beyond a reasonable doubt."[9]

Moore also argues that, even if this instruction is valid, it does not apply to the to the facts of this case and, therefore, should not have been given. An instruction regarding the defendant's failure to explain or deny evidence should be given upon request if the defendant waived his Fifth Amendment privilege by testifying at trial and then "failed to explain or deny any fact of evidence that was within the scope of relevant cross-examination." (*Saddler, supra,* 24 Cal.3d at p. 682.)[10] That is exactly what happened in this case.

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[9] We reject Moore's unreasonable argument that this instruction is somehow flawed simply because the language used to convey these concepts is not identical to language that appears in CALJIC No. 2.62.

[10] Some courts have also approved giving the instruction when the defendant's proffered explanation is bizarre or inherently implausible. (See *People v. Mask* (1986) 188 Cal.App.3d 450, 455; *People v. Roehler* (1985) 167 Cal.App.3d 353, 392-393; but see *People v. Kondor* (1988) 200 Cal.App.3d 52, 57.)

Moore testified that he was not present when Arroyo was killed and that he had no knowledge about the shooting. The prosecution presented evidence of Moore's pre-trial statements to investigators which contained a multitude of accurate details about the crime and the crime scene. Moore did not deny that he previously made those statements or explain how he could have known so many accurate details regarding the circumstances of the crime.

Finally, Moore points out that the Bench Note for this CALCRIM instruction recommends that the trial court undertake a specific factual inquiry before giving this instruction to the jury to ensure that the instruction actually applies. Moore complains that the record does not establish that such an inquiry was conducted in this case. However, he cites no authority which imposes such an obligation on the trial court. We decline to establish such an obligation for the first time in a case such as this where the record does not even indicate that there was any objection to giving CALCRIM No. 361. In any event, if failing to conduct such an inquiry was error, it was not prejudicial because, as we have just explained, there was a factual basis for the instruction.

3. *CALCRIM No. 362, and CALCRIM No. 371*

Moore seeks reversal of the judgment on the ground that the trial court gave two instructions regarding evidence of Moore's consciousness of guilt.

The jury was instructed with CALCRIM No. 362 that: "If the defendant made a false or misleading statement relating to the charged crime, knowing the statement was false or intending to mislead, that conduct may show he was aware of his guilt of the crime and you may consider it in determining his guilt. [¶] If you conclude that the defendant made the statement, it is up to you to decide its meaning and importance. However, evidence that the defendant made such a statement cannot prove guilt by itself."

The jury also heard CALCRIM No. 371, which states: "If the defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that the defendant made such an attempt,

it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself."

Moore concedes there was a factual basis for giving CALCRIM No. 362, but superficially asserts that there was "no evidence" that would justify giving CALCRIM No. 371. The trial court found that Moore's telephone calls to his friends and family provided the factual basis for this instruction. Indeed, Moore made statements during those phone calls which could reasonably be construed as attempting to hide evidence and coach witnesses and as discouraging witnesses from testifying against him. Therefore, there was a factual basis for this instruction.

Moore also contends that both of these consciousness of guilt instructions are unconstitutional because they are "impermissibly argumentative" and they invite the jury to draw impermissible inferences regarding the defendant's state of mind. However, Moore concedes that our Supreme Court has rejected these precise arguments. (See *People v. Nakahara* (2003) 30 Cal.4th 705, 713; *People v. Jackson* (1996) 13 Cal.4th 1164, 1223-1224; *People v. Crandell* (1988) 46 Cal.3d 833, 871.) As Moore also concedes, this binding authority requires us to reject his claims of error in the present case. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

4. *CALCRIM No. 548*

Moore contends that the judgment must be reversed because the jury heard the following instruction based on CALCRIM No. 548: "The defendant has been prosecuted for murder under two theories: (1) malice aforethought, and (2) felony murder. [¶] Each theory of murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty of murder unless all of you agree that the People have proved that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory."

Moore contends that the trial court violated his constitutional rights to due process, to have all elements of the crime proved beyond a reasonable doubt and to a unanimous jury by instructing the jury that it did not need to unanimously agree on the same theory. Moore concedes, however, that the Supreme Court has expressly rejected his arguments.

(See *People v. Nakahara, supra*, 30 Cal.4th at pp. 712-713; see also *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Lewis* (2001) 25 Cal.4th 610, 654; *People v. Box* (2000) 23 Cal.4th 1153, 1212.) As Moore also concedes, this binding authority requires us to reject his claim of error, a claim Moore makes solely to preserve the issue for later review.

F. *Cumulative Error*

Moore's final contention is that, even if the errors in this case are harmless when considered individually, the cumulative effect was prejudicial. We summarily reject Moore's cumulative error analysis because it rests, and indeed depends, on his incorrect assumption that all of his claims of error are sound. In fact, there were only two errors in this case. Further, as we have already explained, the error in the former version of CALCRIM No. 358 simply did not cause any prejudice under the circumstances of this case.

The violation of Moore's *Miranda* right to remain silent was serious and troubling. However, we have carefully reviewed the record before us and are certain in our conclusion that Moore has failed to carry his burden of satisfying the prejudice prong of his ineffective assistance of counsel claim. Contrary to Moore's repeated contentions on appeal, the evidence of his guilt was overwhelming and it is not reasonably probable that the outcome of this case would have been different if the trial court had excluded evidence of statements Moore made after he invoked his right to silence more than two thirds of the way through his October 14 statement.

IV. DISPOSITION

The judgment is affirmed.

_____
Haerle, J.

We concur:

_____
Kline, P.J.

_____
Lambden, J.